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Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs Metropolitan No. 2 and Metropolitan No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104.

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s t Rincon Hills, and as bailee of the cargo laden thereon, and Shell Oil Company, Incorporated, as charterer of said vessel

Respondents.

BRIEF OF RESPONDENTS DEEP SEA TANKERS, LIMITED, AND SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Opinions of Courts Below

The opinions of the courts below are adequately set forth in the appendix to the cross-petition.

Jurisdiction

The cross-petition asks this Court to review questions of fact decided by the courts below. The alleged jurisdictional basis for a writ of certiorari is Rule 19(b) of this

Court. However, there is no conflict in decisions, nor is there an important question of federal law involved in the cross-petition and there has been no departure by the Court of Appeals from the usual and accepted judicial procedure, in deciding questions of fact, requiring this Court's intervention.

Question Presented

Whether this Court will grant a writ of certiorari to review findings of fact made by the Court of Appeals, which are contrary to those of the District Court, in the unique situation where a Judge of the District Court dies before rendering an opinion and, by agreement, the record made before the trial judge is referred to another District Judge for decision based upon reading the transcript of the testimony and examination of the exhibits, and where upon appeal the Court of Appeals had before it the same transcript and exhibits as were before the District Court?

The opinion in the District Court was written by a judge who had not seen or heard any of the witnesses and, therefore, the usual intangible elements derived from observing the conduct and demeanor of witnesses were missing.

We submit that the decision of the Court of Appeals, in reversing findings of fact made by a District Judge under such circumstances, does not fall within that class of cases over which this Court will exercise its discretionary jurisdiction.

The three questions presented by cross-petitioner as to whether the Court of Appeals "applied proper standards" or "reached the proper result" do not raise questions of law, but refer to questions of fact.

Although cross-petitioner's position is not clear, it apparently urges that in order for the Court of Appeals to reverse the District Court the findings of the District Court must be "clearly erroneous" as distinguished from

"erroneous". We urged, upon the appeal, that because Judge Clancy had not seen or heard any of the witnesses, all that the appellants (respondents in this Cross-Petition) would have to prove would be that his findings were erroneous; but that, in any event, Judge Clancy's findings were "clearly erroneous". The opinion of the Court of Appeals states that its new findings were made "in accordance with the clear weight of the evidence" (Cross-Petitioner's appendix, 17a).

In this particular instance it makes no difference whether the findings of fact by the District Court were "erroneous" or "clearly erroneous" because the Court of Appeals opinion is based upon the "clear weight" of the evidence, and this is just another way of saying "clearly erroneous".

Statute and Rule Involved

28 U. S. Code, sections 1254(1) and 2101(c). Rule 19(b) of the Rules of this Court.

The Court of Appeals would be justified, under the circumstances created by the trial judge's death, in substituting its opinion for that of the District Court regardless of whether the District Court was simply erroneous as distinguished from clearly erroneous. In any event, the issue raised by the cross-petition concerns only questions of fact under unusual circumstances which are not of such general interest and importance as to be reviewed by this Court, pursuant to its discretionary powers under the Statute and Rule cited.

Cross-petitioner claims that Rule 1, Article 18, of the Inland Rules of Navigation, 33 U. S. C. 203, is involved in this appeal. It is true that this was one of the statutes which was considered by the Court of Appeals (Cross-Petitioner's appendix, 28a). It is not true, however, as

hereinafter shown, that the Court of Appeals considered the statute under the facts alleged by cross-petitioner.

We submit that cross-petitioner's claim that Rule I, Article 18, is involved in this cross-petition, as used in the context in which it was presented, is not correct and that the citation of this rule of navigation is simply for the purpose of giving the appearance that some question of law is involved.

Statement

A libel was filed by the respondents in the United States District Court for the Southern District of New York to recover damages resulting from the grounding of the s/t Rincon Hills on November 26, 1951, in New York harbor. The libel was *in personam* against Central Railroad Company of New Jersey, and *in rem* against its tug, the Long Branch, and its carfloats No. 61 and No. 56. The libel also proceeded *in personam* against Metropolitan Sand & Gravel Corporation, and *in rem* against its tugs, Metropolitan No. 2 and Metropolitan No. 3, and *in rem* against the three sand scows which were being towed by Metropolitan No. 2.

Metropolitan Sand & Gravel Company answered the libel. Central Railroad Company of New Jersey did not answer but, instead, filed separate petitions seeking exoneration from, or limitation of, liability.

The libel and the petitions were tried before the Hon. Henry W. Goddard from March 11, 1955 to June 10, 1955. Decision was reserved. Judge Goddard died in August, 1955, before briefs were submitted to him. By agreement, the transcript of testimony and exhibits were referred to Hon. John W. Clancy for decision by him upon the entire record made before Judge Goddard together with briefs and oral arguments if desired by Judge Clancy.

Main briefs were furnished to Judge Clancy on May 7, 1956. Reply briefs were furnished to him on May 23, 1956. Final or Answering briefs were furnished on May 28, 1956. Judge Clancy did not call for oral argument. His opinion, in final form, is dated June 20, 1956, or 23 consecutive days after final briefs were handed in. The opinion by Judge Clancy is set forth in cross-petitioner's appendix at pages 1a to 13a. The libel was peremptorily dismissed as to all parties named therein. Judge Clancy found as a fact that the grounding of the Rincon Hills was due entirely to her own navigation. He found that whistle signals blown by the Rincon Hills could be ignored and that, in effect, none of the tugs, carfloats or scows were in the immediate vicinity at the time of the events leading up to the casualty or at the time of the grounding. Judge Clancy, in so finding, ignored the testimony of disinterested witnesses who were on ferry boats in the area. These witnesses were disposed of by Judge Clancy with the single sentence "The ferry pilots displayed animus and withered under cross examination" (Cross-petitioner's appendix, page 13a). The fact is that these witnesses had no motive other than to tell the truth. Their ferries were operated by the Department of the Army, the Immigration Department and the City of New York. The Court of Appeals stated "we find no trace of animus in the testimony of these witnesses" (Cross-petitioner's appendix p. 26a).

Appeals were taken to the United States Court of Appeals for the Second Circuit. The appeals were argued on December 10 and 11, 1957 and were decided seven months later on July 14, 1958. The opinion of the Court of Appeals is reproduced in cross-petitioner's appendix, pages 14a to 48a. Judge Medina, writing for the Court, stated "* * * we have *carefully read and studied* the entire transcript of 6793 pages and the [illegible]5 exhibits and

have made new findings of fact in accordance with the *clear weight* of the evidence." (emphasis added) (cross-petitioner's appendix, page 17a). The Court of Appeals found that the Rincon Hills was forced aground by the tug Metropolitan No. 2 and the three scows it was towing and by the tug Long Branch and the two carfloats lashed to said tug. The Court said: "Thus strung out the two tows covered a distance of almost 900 feet, including the 100 feet between the two tows, through which 100 feet the tanker could not have passed, and they completely blocked off the tanker" (cross-petitioner's appendix, page 33a).

Cross-petitioner owned every vessel in one flotilla consisting of the Metropolitan No. 2 and three scows, and the railroad owned every vessel in the other flotilla consisting of the Long Branch and two carfloats.

The Court of Appeals held that cross-petitioner and Central Railroad Company of New Jersey were both liable *in personam* for the faulty navigation of their respective tows, consisting of the Metropolitan No. 2 which was towing three scows and the Long Branch which was propelling two carfloats alongside. The Court of Appeals also held that the tug Metropolitan No. 2 and the tug Long Branch were liable *in rem* for navigating themselves, together with the scows and the carfloats, so as to negligently force the Rincon Hills aground. The Court of Appeals further held that, since the scows and the carfloats were passive instruments under the control of their respective tugs and had no motive power of their own, the scows and carfloats were not liable *in rem* for having blocked the way of the tanker.

The tug Metropolitan No. 3 was a "helper" tug, which was not towing anything at the time in question, but was following behind the Metropolitan No. 2 and her scows and subsequently removed a scow being towed by the Metro-

politan No. 2 and took that scow elsewhere. The Court of Appeals held that the Metropolitan No. 3 did not contribute to blocking the Rincon Hills and therefore was not liable *in rem*.

Cross-petitioner and the railroad both sought to limit the amount of their liability to the values of their respective tugs. Deep Sea Tankers, Limited and Shell Oil Company, Incorporated, owner and charterer, respectively, of the Rincon Hills, sought payment of damages in full. The Court of Appeals held that cross-petitioner could limit its liability to the value of the Metropolitan No. 2 and did not have to include in its limitation fund the values of its scows; and that the railroad could limit its liability to the value of the Long Branch and did not have to include in its limitation fund the value of its carfloats.

Deep Sea Tankers, Limited and Shell Oil Company, Incorporated filed a petition for a writ of certiorari on November 12, 1958, (October Term, 1958, No. 511) to review that portion of the judgments of the Court of Appeals which permitted Metropolitan Sand & Gravel Corporation and Central Railroad Company of New Jersey to limit liability.

The time for Central Railroad Company of New Jersey to apply for a writ of certiorari expired on November 12, 1958, without any application by it. Apparently the railroad is satisfied that the Court of Appeals' action in reversing the findings of fact made by the District Court would not or should not be disturbed by this Court.

Metropolitan Sand & Gravel Corporation, however, filed a cross-petition.

A paragraph appears at the top of page 2 of the cross-petition which requires clarification in order to be understood without being mislead. That statement is: "Although the Court of Appeals *agreed* with the District Court that the tug Metropolitan No. 3 *and the three sand scows were*

without fault; it entered judgment reversing, *in its entirety*, the District Court's decree *exonerating* those four vessels." (emphasis added).

The quoted statement combines several facts, taken out of context, and by use of broad language gives an entirely incorrect impression. The tug Metropolitan No. 3 was not towing the three scows. The towing vessel was the Metropolitan No. 2, which was found at fault for crowding the Rincon Hills and for placing itself and the three scows in such a position as to block the Rincon Hills as she was approaching Dimond Reef. Furthermore, the Court of Appeals did not "agree" with the District Court that the scows were not at fault. There is a vast difference between the District Court's finding and the Court of Appeals' finding. The District Court found that the scows towed by the Metropolitan No. 2 were approximately 500 feet from the pier line and the Battery Sea Wall (Cross-petitioner's appendix 5a) and that the "Rincon Hills never at any time navigated with respect" to them (Cross-petitioner's appendix 8a). The Court of Appeals found that the scows were "at fault for being where they had no business to be at a time when a deep draft vessel was steaming up the Range." (Cross-petitioner's appendix 30a). The Court of Appeals held that "the tows were at fault for not keeping away from the immediate vicinity of the Range, where they interfered with the navigation of the tanker" (Cross-petitioner's appendix 31a) but that the scows were not liable* because they were passive instruments under the control of the Metropolitan No. 2 (Cross-petitioner's appendix 19a, 47a). The scows were thus not "exonerated" as alleged in the cross-petition, nor was there any "agreement" between the Courts below, and there is a vast difference between the scows not being present, and their being present but not liable.

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*The only way a vessel itself can be held liable is in rem.

The tug Metropolitan No. 3 is not involved in this appeal. As above noted, that tug was following the Metropolitan No. 2 down the East River and its objective was to remove a scow from the tow of Metropolitan No. 2 and take it elsewhere. The Court of Appeals found that the Metropolitan No. 3 was not at fault and so stated very clearly in its opinion (Cross-petitioner's appendix 23a). The statement in the cross-petition is partially accurate in that the Court of Appeals did reverse the decree of the District Court, but the phrase "reversing, *in its entirety*" is not at all accurate (Cross-petition, p. 2). The Court of Appeals, in reversing the decree of the District Court, remanded the cases for further proceedings not inconsistent with its opinion (Cross-petitioner's appendix 48a, 50a) and its opinion clearly showed that the reversal of the decree did not apply to the Metropolitan No. 3 (Cross-petitioner's appendix 23a).

The cross-petitioner's statement of issues and facts is also somewhat less than accurate and complete, and is also quite misleading to those not familiar with the complete record. Cross-petitioner employs an argumentative approach which, for the most part, is based upon a careful selection of excerpts from conflicting testimony. The excerpts are often taken out of context and joined with other excerpts in such a manner as to suggest error. The statement also suggests issues which cross-petitioner does not actually raise. A suggestion is made, for instance, that a question of law exists as to whether the Court of Appeals exceeded the scope of its authority to review findings of fact. The real reason for the cross-petition appears on page 14. Cross-petitioner there states that if this Court grants a writ of certiorari to Deep Sea Tankers, Limited and Shell Oil Company, Incorporated to review the question of cross-petitioner's right to limit liability, then cross-petitioner wants this Court to review the findings of fact made in the Courts

below.* Central Railroad Company of New Jersey, owner of the Long Branch and of the two carfloats, has practically conceded by not cross-petitioning that the facts as found by the Court of Appeals are correct and should not be disturbed. However, the cross-petitioner (see, for example, pp. 15, 16) makes many references to the railroad's tug and carfloats as blocking the Rincon Hills. Thus, the railroad remains passive while the cross-petitioner attempts to escape liability by fixing it upon the railroad. Parenthetically, it should be noted that the alleged value of the tug Long Branch is only $30,000, while the tug Metropolitan No. 2 is worth at least $100,000.

Argument

Since cross-petitioner's treatment of the facts is based upon a careful combination of selected excerpts, and attempts to create an issue of law concerning the application of whistle signals as required by the Inland Rules of the Road, it is necessary to refer briefly to the contested questions of fact.

The Rincon Hills was proceeding to her East River discharge berth through the waters between Dimond Reef (north of Governors Island) and Lower Manhattan. She was proceeding on the East River Range which is 300 feet northerly of Dimond Reef. The Range is provided for the specific purpose of guiding deep draft vessels safely past Dimond Reef. The area is shown on Exhibits 8 and 14, copies of which are attached hereto as Appendices B and C.

The Rincon Hills found her way blocked by the Metropolitan tow (the tug Metropolitan No. 2 with three loaded sand scows made up astern in single fashion) and by the

*See also page 9 of Metropolitan Brief in Opposition to Petition of Deep Sea Tankers et al, No. 511.

Jersey Central tow (the tug Long Branch with two railroad carfloats, one made up on each side). Both tows were proceeding outbound from the East River and were meeting the Rincon Hills in the waters between Dimond Reef and Lower Manhattan, the Jersey Central tow being close astern and somewhat to port of the Metropolitan tow.

The Court of Appeals found that "The two tows involved in this case, however, as will shortly appear, were huge, slow-moving, cumbersome flotillas and it requires little argument to demonstrate that they would constitute a substantial menace to the navigation of large vessels in the vicinity of Dimond Reef, especially on an ebb tide, unless kept clear of the Range." (Cross-petitioner's appendix, 18a)

The captains of both of these outbound tows were ignorant of the fact that the ebb current was still running out of the East River, and made no allowance for it. Neither tug had been furnished with available documents which would have shown that the ebb current was still running out of the East River. Both captains erroneously believed that it was slack water. They erroneously believed that slack water coincided with low water, and did not know that the current ran out of the East River for more than one hour after low water at the Battery (Cross-petitioner's appendix 20a).

Having made no allowance for the ebb current still running out of the East River, respondents' tows were swept by the ebb current down to and across the center line of the deep water channel between Dimond Reef and Lower Manhattan, and even further south across the Range line (which line is only 300 feet to the north of Dimond Reef). The tows were then swept crabwise, along and south of the Range Line, across the path of the Rincon Hills. The movements of the vessels are depicted on Exhibits 8 and 14, Appendices B and C.

The Rincon Hills blew a one-whistle signal to the tows. Neither tug blew a signal of its own and neither tug answered the Rincon Hills. Thereupon the Rincon Hills blew the danger signal and to avoid collision with the tugs and tows, the Rincon Hills was forced to stop her engines and to turn to her right, thus taking her off the Range, and directly toward Dimond Reef. Both tugs failed to answer the alarm signal of the Rincon Hills, and both tugs failed to take any action in response thereto. The sequence is shown on Exhibit 8, Appendix B.

The action of the Rincon Hills in turning off the Range and to her right toward Dimond Reef just barely avoided collision with the tows, the clearance being estimated to be as little as 10 feet.

When the Rincon Hills had been forced to the point where collision with the Metropolitan tow was just barely avoided and the Jersey Central tow was just pulling across the bow of the Rincon Hills, the pilot of the Rincon Hills ordered her engines put full ahead and her rudder hard left. The helmsman made a helm error which the Court of Appeals found was *in extremis*, and therefore excusable.

Cross-petitioner, in presenting its abbreviated version of the facts, ignores two important points. First, the fact that all of the tugs and tows were in motion at all times as they came down the East River, met the Rincon Hills, embarrassed her navigation, and then continued on their way. Second, the Rincon Hills was also in motion, in the opposite direction, as she entered the East River, was forced off the Range, and thereafter grounded.

The events are isolated by the cross-petitioner, thereby giving an erroneous impression. The two principal events isolated by cross-petitioner are: (1) the time when the Captain of the Rincon Hills emerged from the chartroom into the wheel house and saw the Long Branch; and (2) the time when the helmsman, seeing the Long Branch crossing

from starboard to port, reacted to an order to turn to port (and into apparent collision) by instinctively turning to starboard.

The Rincon Hills was on the Range when she blew her one-whistle signal to the Metropolitan tow and the Long Branch tow. There was no answer from either tug and no signal of their own. The Rincon Hills then blew the alarm, stopped her engines and her rudder was turned to her own right. The ebb current was carrying the Rincon Hills to the south of the Range. The stopping of her engines and the right rudder, while the ship was affected by the current, took the Rincon Hills to the south of the Range. The Metropolitan No. 2 and her scows, *after forcing the Rincon Hills into a position of danger below the Range,* were no longer an *immediate* threat to navigation. The Metropolitan tow had done her damage and was passing by. However, the tug Long Branch which was following the Metropolitan No. 2 was then crossing the bow of the Rincon Hills. It was at this time that the Captain of the Rincon Hills came out of the chartroom and saw the Long Branch.

Cross-petitioner states that the Rincon Hills went right to avoid hitting the Jersey Central carfloats and not the Metropolitan tug and tow (Cross-petition pp. 7-8, 16).

This is putting a too liberal construction on the testimony of the Master. The Pilot had the conn (control of the ship) not the Master, who was in the chartroom. Cross-petitioner's flotilla cleared the bow of the Rincon Hills *before* the railroad flotilla, therefore, when the Master rushed out of the chartroom his thoughts and vision were wholly occupied with the carfloats which were just then crossing his bow (Cross-petitioner's appendix 22a). The Court of Appeals found, and rightly so, that cross-petitioner's flotilla was at fault for being where she had no right to be, namely in the waters near the Range designed for deep draft ships, at the time when the Rincon Hills

was on the Range or steadying on a course past Dimond Reef (Cross-petitioner's appendix 30a, 31a).

Cross-petitioner attempts to confuse the issue by stressing those events which related to the Long Branch and its carfloats while ignoring the fact that the *initial* right rudder movement was caused by *both* the Metropolitan No. 2 and the Long Branch and that *both* tows had *already* forced the Rincon Hills south of the Range (Cross-petitioner's appendix 38a, 39a).

The Rincon Hills because of her deep draft was required to stay on the Range. This was not true of the two flotillas involved, they had the entire river in which to maneuver. Yet they failed to keep away from the Range and blocked the Rincon Hills from using the Range and the waters near the Range.

Cross-petitioner contends (pp. 10, 17) that the helmsman's error was not one *in extremis* because it is asserted that he was not in a position to exercise discretion or judgment as to the manner in which the Rincon Hills should be navigated; and cross-petitioner cites in support of its contention the case of *A. H. Bull S. S. Co.* v. *United States*, 34 F. 2d 614 (2 Cir. 1929). The *Bull* case does not support petitioner's argument, because in the *Bull* case the vessel asserting the defense of error *in extremis* was the vessel which herself had brought about the dangerous condition. A contrary situation exists in the present case, the Court of Appeals having found that the navigation of the Rincon Hills did not contribute to bringing about the imminent danger of collision which caused "the natural and instinctive reaction of the helmsman" in starting to turn the wheel right whereas the pilot had ordered hard left (Cross-petitioner's appendix 39a).

Cross-petitioner by a rather circuitous course is contending that the Court of Appeals erred in holding a head to head meeting situation was involved. When the Rincon

Hills entered onto the Range, proceeding *easterly*, the pilot blew one blast as provided for by the Inland Rules for Navigation, 33 U. S. C. § 203. One blast signifies that the initiator intends a port to port passing. The pilot had to know the intention of both flotillas. The lack of tidal data on the part of the tug Masters made for a dangerous situation. The tows were crabbing (sideways motion because of the ebb current) and were being swept along the Range in a *westerly* direction. With the Rincon Hills moving easterly, and the flotillas westerly, it definitely was a meeting situation.

The question whether vessels are meeting or crossing is determined by the "reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment." *The Victory and The Plymothian*, 168 U. S. 410, 421 (1897). The respective headings of the vessels at any one given time are immaterial, it is the intended projected courses which show whether a meeting situation is involved. *The Panther*, 79 F. 2d 625, 626 (2nd Cir. 1935).

Cross-petitioner cites a number of cases for the proposition that this was not a meeting situation (Cross-petition p. 18). All these cases involved vessels on steady or relatively steady courses which if left unchanged would have allowed a safe passage. But in the present case the pilot could not determine, in the absence of a signal reply from them, the intentions of the tows. Prudent navigation requires that the intentions of another vessel standing into one's projected course be ascertained. The pilot of the Rincon Hills saw the situation as one of meeting head to head. The Inland Rules require a whistle signal of one short blast for a port to port passing. See *The Eugene F. Moran*, 154 Fed. 41 (2nd Cir. 1906); *The Sandmaster*, 105 F. 2d 1009 (2nd Cir. 1939).

Cross-petitioner is confusing the issue when it states that "one short blast of the whistle signifies intention to direct course to own starboard." (Cross-petition, p. 19) This is Rule 80, Pilot Rules for Inland Waters, Title 33, Code of Federal Regulations 80.03. The two rules are different but not inconsistent. Both rules are used in Inland waters but to signify somewhat different intentions. In *Postal Steamship Corp.* v. *El Isleo*, 308 U. S. 378 (1940) this Court stated that where the Inland Rules and the Inspector's Rules (Pilot Rules) are not directly inconsistent, the latter are valid and coexist with the former. In any event the pilot was correct in making the one blast signal required by the Inland Rules. See also *The Fulton*, 54 F. 2d 467 (2nd Cir. 1931).

This Court has held that these passing signals must be answered. *The New York*, 175 U. S. 187, 206-07 (1899). In the present case neither tug answered the one-blast signal of the Rincon Hills, nor the danger signal for that matter (Cross-petitioner's appendix 29a). If the tugs did not wish to assent to the passing signals of the Rincon Hills they should have blown the danger signal, yet neither one made any signal whatsoever.

CONCLUSION

The cross-petition does not raise any questions of law of general importance but, instead, asks this Court to review questions of fact decided in the lower courts and does not come within that class of cases over which this Court should exercise its discretionary jurisdiction. In any event, the findings of the District Court were not only erroneous, but clearly erroneous and required reversal by the Court of Appeals.

On the basis of the foregoing we submit that this Court should deny the cross-petition. If, however, the Court

should wish, in dealing with the merits of the cross-petition, to have before it, in more detail, points and supporting testimony which show that the decision of the District Court required reversal, we attach hereto an Appendix containing such points and excerpts from the testimony, together with copies of pertinent Trial Exhibits.

Respectfully submitted,

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APPENDIX A

POINTS AND EXCERPTS FROM THE TESTIMONY

1. As to the position of the Metropolitan tow when it began to pull in toward South Ferry.

While the tug captain, Hutton, claimed at the trial that it was after passing Pier 9 that he began to pull in to starboard (318a),[1] it was developed upon cross-examination that he had given a statement (Exhibit BBB) to Metropolitan counsel only 17 days after the grounding of the Rincon Hills, which statement Hutton had signed and to the truth of which he had sworn. Over the objection of Metropolitan counsel (311a), Judge Goddard ordered the production of such statement (312a). A copy of Hutton's statement, made on December 13, 1951, is attached hereto as Appendix D. In his statement, Hutton swore:

> "* * * After passing below the Brooklyn Bridge the tow was *favoring the middle of the river* and when the tow was about off Pier 9, New York I observed a tanker, which later proved to be the RINCON HILLS. I should judge that this tanker at that time was about abeam of the light on the northerly end of Governors Island and approximately 1000 feet off the light. The METROPOLITAN No. 2 and her tow continued down the river and when approaching or in the vicinity of *Pier 5* we began to pull in toward South Ferry so as to be in a position to round the Battery." (Emphasis added).

Judge Goddard recognized the conflict between Hutton's direct testimony and the affidavit given by him within a few days after the stranding. Judge Goddard also fully

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[1]Unless otherwise stated, page references hereinafter are to pages of the Appendix to the Brief of Deep Sea Tankers, Limited, et al. in the Court of Appeals, and filed in this Court under Docket No. 511.

recognized the importance of fixing the position in the East River at which the Metropolitan No. 2 began to pull in toward South Ferry. Because of the unreliability of Hutton as shown by this contradiction, Judge Goddard himself questioned Hutton closely and brought out that the Metropolitan No. 2 was favoring the middle of the river and that it was *off Pier 5* that the Metropolitan No. 2 began to pull in toward South Ferry (319a, 320a).

> "The Court: Let us see, Captain. You just told us, and *listen to me, because I am trying to straighten you out*, you just told us you were favoring the middle of the river when you were about 15 feet south of the Brooklyn Bridge. You remember that?
>
> The Witness: Yes.
>
> The Court: That is right, isn't it?
>
> The Witness: That is right.
>
> The Court: Yes. Then you have just said you don't favor the middle of the river as you come down.
>
> The Witness: That is right.
>
> The Court: Therefore, you must have some time, headed more toward the shore, isn't that right?
>
> The Witness: That is right, you follow the pierheads down.
>
> The Court: When did you turn in towards shore, change your course to head in towards shore?
>
> The Witness: That is a hard way to answer it, Judge. As you are standing up there steering, you don't directly take an object and push it aft. You steer your boat you come on down here just as nice as can be. You don't——
>
> The Court: Captain, *you must remember that you have gone into a great deal of detail in your testimony in reply to Mr. Hanan's questions. All that you are being asked now is when did you change your heading from about—favoring the middle of the river.*[2]

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[2]Emphasis added in this and later quotations from transcript of testimony.

The Witness: Well, we have been changing the heading all the way down the river. We are steering the boat and judging from the pierheads.

The Court: Well, *I won't try any further.*"

And at 321a:

(*By Mr. Haight*)

"Q. Captain, if you put your attention again, please, on the sentence at the top of page 2, after you described, on first sighting the tanker, when you were off Pier 9, you said the Metropolitan No. 2 and her tow continued down the river. A. Yes.

Q. And *when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry* so as to be in a position to round the Battery. A. *That is the statement.*

Q. Is it not a fact that it was *off Pier 5* that you first—— A. I won't say——

Q. (Continuing) —altered your course? A. You are steering the boat and tow. We are working——

The Court: Now, Captain, you seem to be a pretty intelligent person. *That is a simple question.*

The Witness: Yes, but you don't directly go that way. You are steering the boat along this edge.

The Court: What did you say in the statement?

The Witness: Statement says off Pier 5 I pulled in.

The Court: Is that true or not?

The Witness: *Well, it must be right. I signed it.*"

Hutton was an evasive witness. When asked about the width of the East River, he sought to avoid the issue (316a):

"A. This is all a lot of crap——

Mr. Hanan: Now, Captain, stop it.

The Witness: No fooling, Jesus——

Mr. Hanan: Now, just answer the question. Hush."

Judge Goddard closely questioned Hutton, during cross-examination, as to whether he watched the Rincon Hills after the tanker blew her one-whistle signal, which was heard by Hutton on the Metropolitan No. 2 (327a-328a):

By Mr. Haight.

Q. Well, you were watching her, weren't you, Captain Hutton? A. Glancing, yes.

Q. Did you look at her when she blew the one-whistle signal? A. No. Paid no attention to her.

The Court: You what?

The Witness: No.

The Court: You did not look at her?

The Witness: No.

Q. After you heard the one-whistle——

Mr. Hanan: Captain, will you read your statement before you answer the questions now ?

The Witness: Well, we heard the one whistle between Pier 4 and this long rack, and I am about three or four hundred feet off this rack——

Mr. Hanan: Captain, will you read your statement on page 2, what Mr. Haight is questioning you about?

Mr. Haight: It is now one o'clock. I have no objection to stopping for lunch and letting him read his statement and continue after lunch.

Mr. Hanan: Well, let him finish his answer.

The Witness: Well, it is a good thing we all ain't got good education around here.

Mr. Hanan: Do you see where it starts 'The Metropolitan No. 2'?

Mr. Haight: We have to do the best with what we have, all of us, Captain.

Mr. Hanan: Mr. Haight is questioning you about page 2 here. Now you read the language that he is using in his questions so you will know what he is talking about.

The Court: Well, *I want to ask him now what his testimony is.*

By the Court.

Q. You just said that you heard the Rincon Hills blow a whistle but you did not look at her; did not see her, is that right? A. I heard the whistle.

Q. But *you did not look at her?* A. No, because I was——

Q. *You did not look at her?* A. I had other things to draw my attention.

Q. *You did not look at her?* A. No.

Q. When did you look again? When did you look? A. After we were gone by. That is, the tail end of our tow was gone by the ship; because I had this Ellis Island Ferry Boat to contend with coming up inside of me.

The Court: Well, do you want to take our recess now?

Mr. Haight: Yes."

2. As to the position of the Jersey Central tow when the Rincon Hills blew her one-whistle signal.

Hutton on the Metropolitan No. 2 *did* hear the one-blast signal blown by the Rincon Hills, and his sworn statement (Exhibit BBB, copy attached) *taken by his own counsel* and confirmed by Hutton at the trial (328a) is of vital importance. It places the Long Branch and her carfloats *off Pier 9 and out in about the center of the river* at the time when the Rincon Hills blew her one-whistle signal. Hutton swore (page 2) that he:

> "* * * looked around to see for what vessel the signal was intended. I observed the tug Long Branch with a carfloat on each side *up off Pier 9 and out in about the center of the river bound down the river* and concluded that the tanker Rincon Hills was signalling to the tug Long Branch."

This is a specific statement, made only 17 days after the casualty, placing the Long Branch tow "up off Pier 9

and out in about the center of the river bound down the river" at the moment when the Rincon Hills blew her one-whistle signal.

When confronted at the trial with his affidavit, Hutton tried hard to escape from the damaging statement which he had made about the Jersey Central tow, before the two tows were represented by different members of the same law firm.

In this connection it is interesting to note that Metropolitan, in its answer to the libel, expressly pleaded as an affirmative defense that any damage sustained by the libelants "was caused by or contributed to by a person or persons, vessel or vessels for whose acts" respondent Metropolitan was not liable (662a). This allegation is a clear reference to the *Jersey Central tow*, as shown by the fact that the statement (Exhibit BBB, page 2), given by Captain Hutton of the Metropolitan No. 2 *to his own counsel* seventeen days after the stranding of the Rincon Hills, reveals that Hutton concluded that the one-whistle signal given by the Rincon Hills, at the beginning of the events leading directly up to her grounding, was blown *to the Jersey Central tow.*

Again, Judge Goddard took an active hand in the interrogation of Hutton (333a):

> "The Court: Captain, let us be a little clearer about these things. We have taken a lot of time.
>
> *By the Court*:
>
> Q. You heard the one-whistle blown? A. That is right.
>
> Q. Did you think it was for you? A. No.
>
> Q. What did you do? Did you look around to see if it was blown to somebody else? A. Well——
>
> Q. *Answer that yes or no.* Did you look around to see if it was intended for some other craft? Did you look around? A. Yes, I might have looked around, yes.

Q. *Not whether you might have.* Did you? A. Yes, I looked around.

Q. You looked around and you saw the railroad float up the river, just about off Pier 9, wasn't it? A. Yes.

Mr. Haight: Yes, off Pier 9.

The Witness: Yes, off Pier 9.

Q. *About the middle of the river as you just testified to?* A. Yes.

Q. Now you want to stand on that testimony now, do you? A. *Yes, I will stand on it.*

* * *

And at 334a:

"The Court: Did you think it was blown to you or some other craft?

The Witness: It wasn't blown at me.

The Court: *That is not what I asked you.*

The Witness: Well, that is the only way that I could answer, that I don't steer another man's boat.

The Court: When you heard it——

The Witness: Yes.

The Court: —you told us you didn't think it was intended for you, is that right?

The Witness: That is right.

The Court: You also told us you looked around to see——

The Witness: I looked around at my tow and I seen the carfloats.

* * *

At 333a, 335a:

By Mr. Haight:

Q. Captain Hutton, will you answer the question. A. The whistle, who he was intending to?

Q. Yes. A. I don't know.

Q. My question is, did you not in December, 1951, 17 days after these events, did you not then state in a sworn affidavit that when you looked and saw the Long Branch and carfloats as you described in your statement and again now, you concluded

that the tanker Rincon Hills was signaling the tug Long Branch? Is that true?

Mr. McKernan: May I have an objection and exception to that question?

The Court: Objection overruled.

Mr. McKernan: May I have an exception to the ruling on that question?

The Court: Yes, certainly.

Mr. Hanan: Read the statement, Captain, before you answer.

The Witness: *Yes, but "conclusion" can't you put another word in there?*

* * *

The Court: Now, Mr. Hanan has asked you to read your statement.

The Witness: Yes, I know.

The Court: And after you read it will you tell us whether it is true.

The Witness: *Well, according to the statement there, it must be true, when I signed for it.*

The Court: Then you want to say it is true, is that right?

The Witness: *The statement is true.*

3. As to it being a meeting situation.

When pilot Rowohlt blew the one-whistle signal, the Metropolitan tow had been swept by the ebb current, coming out of the East River, to a position where "about the middle half of the last scow was on *the Range*" (39a). The position of the sand tow was marked by Rowohlt on Exhibit 8 as MET 1.

When the ferry Robert E. Shannon was herself crossing the Range Line, on her trip from Manhattan to Governor's Island, Captain Henry Hoffmann saw the Metropolitan tow across the Range Line, *with the middle scow on the line of the Range and her last scow to the south of the Range Line and toward Dimond Reef* (76a). At this

time, Captain Hoffmann also looked to his right and saw that the Rincon Hills was "rounding to get on the Deep Water Range. She was already headed toward the East". (64a). The positions of the Metropolitan tow and of the Rincon Hills, when the ferry Shannon was on the Range Line, are marked by Captain Henry Hoffmann on Exhibit 14 as Sand Tow 2 and Tanker 2.

When the Rincon Hills blew her one-whistle signal, by which time the ferry Shannon had completed her trip and was in her Governors Island slip, Captain Henry Hoffmann "looked toward the *sand tow* which I figured the tanker meant the whistle for. I then found that *the whole sand tow had drifted down in the vicinity of the Dimond Reef*" (66a). The Metropolitan tug "was heading toward the ferry slips like he was *trying to get out of the way of the tanker*" (67a).

McConnell on the tug William Meseck, on the starboard side of the Rincon Hills, saw the Metropolitan tow "starting over from about Pier 9, Brooklyn, headed for the New York Shore." At the same time he saw the Jersey Central tug and carfloats *"right around the stern of the Metropolitan."* At that time "the Jersey Central was *a little over to Brooklyn more* and he was *coming up alongside the Metropolitan* on his port side" (184a).

Captain Edward Hoffman, on the tug C. Hayward Messeck, on the port side of the Rincon Hills saw the Metropolitan tow "coming down off Pier 6 in the East River". Captain Hoffman was intending to bring his tug alongside the Rincon Hills to make fast on her port bow, but Hoffman "was prevented from reaching the bow of the ship", because "this *sand tow swung down across the bow of the ship,* and there wasn't room for me to go up there, up to the bow of the ship" (96a). The Metropolitan tow forced Captain Hoffman to bring his tug "in alongside about 15 feet off" the Rincon Hills, in order to avoid collision be-

tween the sand tow and the tug. The stern of the last scow of the Metropolitan tow cleared Captain Hoffman's tug by about 40 feet (97a). The Metropolitan No. 2 *"didn't get the tail end of his tow any further to the right* until after he had passed the ship" (101a).

Whelan, on the ferry Ellis Island, saw both tows "being swept down with the tide" and knew that the situation between the two tows and the Rincon Hills would be a very close one with serious danger of collision (83a). The tug Metropolitan No. 2 "was pulling like heck to get away from across the bow of that ship" (88a).

When pilot Rowohlt blew the one-whistle signal, the Long Branch tow was following close behind the Metropolitan tow and on that tow's port quarter. The Long Branch tow also "came on the Range" (40a).

Captain Henry Hoffmann, on the ferry Shannon, in her Governors Island slip, when the Rincon Hills blew her one-whistle signal "saw a Jersey Central tugboat with two carfloats just north of the ventilator,* in the northern direction of the ventilator and *toward the Dimond Reef"* (68a).

Captain William Tuttle, in command of the ferry Gold Star Mother, on her trip from Staten Island to Manhattan, was in the vicinity of the Range Line and he "saw a tug and carfloat in the vicinity of the Range" (492a). The carfloat tow was across the bow of the tanker at about a 45-degree angle. The carfloat tow "was coming from the starboard side of the tanker toward the port side" (492a). Captain Tutle also observed a hawser tow ahead and "very close" to the carfloat tow (493a). The relative positions of the ferry Gold Star Mother, the Rincon Hills, the carfloat tow, and the hawser tow are marked by Captain Tuttle on Exhibit 111.

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*This is the ventilator for the Battery-Brooklyn Tunnel. The ventilator is northeast of Governors Island.

Pilot Rowohlt saw the Long Branch tow carried by the ebb current from a position just north of the Range line, when pilot Rowohlt blew the one-blast signal, to a position south of the Range Line, when he blew the danger signal. These two positions of the Long Branch tow are marked by Rowohlt upon Exhibit 8 as CRR 1 and CRR 2. Rowohlt testified that "when I *heard no reply* from either vessel, I gave the alarm and ordered the engines to be stopped". In the meantime "As the tow was progressing down and making a leeway as much as headway, I ordered the wheel to right" (40a).

Mate Richard, of the Rincon Hills, saw the Long Branch tow between two and three points (between 22 and 33 degrees) on the ship's *starboard* bow (136a).

Captain Mullock approved the action of pilot Rowohlt in taking the Rincon Hills off the Range and turning to her own right because "that is the way *I wanted* her to go because otherwise we definitely would have cut those barges and tug in two" (121a). "They were crossing from our right to our left and we had to swing to the right to keep out of the way of them" (121a, 122a).

Wilcox, the helmsman of the Rincon Hills "saw on the starboard bow two carfloats and a tug. As these carfloats proceeded on their course as they passed across the stem and underneath the bow of the Rincon Hills so close that it looked like we were going to ram them" (194a, 195a). As shown above, this was the reason why Wilcox reacted by putting the wheel to the right when pilot Rowohlt ordered hard left.

Philip, purser on the Rincon Hills, with two years experience as an able seaman (157a) heard the Rincon Hills blow the danger signal and immediately went on deck on the starboard side. He saw the Long Branch tow "about 2½ points on the starboard bow of the Rincon Hills" (159a). The tug and carfloats "were headed across our bow at a narrow angle" (159a).

To McConnell, on the deck of the William Meseck, on the starboard side of the Rincon Hills, it appeared that the Long Branch tow was "going across the bow of the ship" (184a) "coming from Brooklyn, headed for New York" (185a).

Captain Edward Hoffman, on the tug C. Hayward Meseck, on the port side of the Rincon Hills, was prevented by the Long Branch tow from bringing his tug forward to make fast on the port bow of the Rincon Hills. "There was a pair of carfloats coming down with a Jersey Central tug, and they *swung down across the bow of the ship*, so I had to lay back. It wasn't safe to approach the bow of the ship" (98a). The carfloats cleared the Rincon Hills by "about 10 feet" and cleared Captain Hoffman's tug by "possibly 20, 25 feet" (98a). This was the *second time* that Captain Hoffman had been prevented from going forward with his tug to make fast on the port bow of the Rincon Hills. The first time was when the Metropolitan tow prevented him from doing so.

The Rincon Hills was on the Range when she blew her one-whistle signal to the Metropolitan tow and to the Long Branch tow.

Pilot Rowohlt was holding the actual heading of the Rincon Hills about 8-10 degrees to the left of the Range Course, so as to offset the effect of the ebb current coming out of the East River and to hold the vessel steady on the Range Course (36a).

McConnell, on the tug William Meseck, on the starboard side of the Rincon Hills, "waited for the ship to come around and get on *the Range. Then* I started to move alongside of her" (182a). When the Rincon Hills blew the one-whistle signal McConnell was "starting in to go alongside" (182a), and the Rincon Hills was on the Range (183a). The Rincon Hills was still proceeding on the Range when she blew the alarm signal to the two tows (183a).

Captain Henry Hoffmann, in command of the ferry Lt. Col. Robert E. Shannon, lying in her slip on Governors Island, looked at the Rincon Hills when she blew her one-blast signal and "she appeared to be exactly on the Deep Water Range" (66a).

The foregoing shows that the Rincon Hills and both tows approached each other substantially along the Range line on opposite courses. While the bow of each vessel involved may not have been headed directly toward the approaching vessel, the courses actually made good constituted "meeting head and head, or nearly so". It has been so held in *Coney Island* v. *Exporter,* 131 Fed. 2d 902; 1943 A. M. C. 34.

4. As to the one-whistle signal and the danger signal blown by the Rincon Hills.

In his opinion (669a), Judge Clancy states with reference to the Long Branch not answering the one whistle signal blown by the Rincon Hills, that "this *omission* was in no respect negligent since the Long Branch was not on a crossing course with respect to the Rincon Hills nor head to head nor on any other course that required a signal."

As to the Metropolitan tow, Judge Clancy states (668a) "When off pier 4 with her tow following relatively straight behind, the tug captain heard a one-blast signal from the Rincon Hills. He did not answer, assuming from the respective positions of tanker and tow that the blast was not intended as a signal directed at him."

Judge Clancy makes no reference whatsoever to the provisions of the Inland Rules or to the Coast Guard Rules which require an exchange of whistle signals between the tows and the Rincon Hills.

Article 18 of the Inland Rules (33 U. S. Code 203) imposes a "duty" on vessels approaching each other head and head, or nearly so, to pass on the port side of each

other "and either vessel *shall* give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel *shall answer* promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other." (Emphasis added.)

The U. S. Inspectors' (Coast Guard) Rules for Inland Waters, Title 33, Chapter III, Section 312.3, known as the *"Half Mile Rule"* provides: "The signals for passing, by the blowing of the whistle, shall be given and answered by pilots, in compliance with the rules in this part, not only when meeting 'head and head', or nearly so, but *at all times when the steam vessels are in sight of each other,* when passing or meeting at a distance *within half a mile of each other, and whether passing to starboard or to port."* (Emphasis added.)

The failure of Judge Clancy to apply the Rules requiring an exchange of whistle signals between the tows and the Rincon Hills is all the more astonishing in view of the fact that Molloy, captain of the Long Branch, admitted on questioning by Judge Goddard and on cross examination that such Rules required the tows to answer the one-whistle signal given by the Rincon Hills (437a).

> "THE COURT: What do you think the rule is, Captain, if the two Vessels are approaching each other and one blows a one whistle—what does the other vessel do?
>
> THE WITNESS: Port-to-port passing——
>
> THE COURT: Yes, but what does it do?
>
> THE WITNESS: Answer him with one.
>
> * * *
>
> *By Mr. Haight:*
>
> Q. Captain Molloy, are you also familiar with the Coast Guard Rule known as the Half Mile Rule, and which is, for reference of Court and counsel, Section 312.3, as reproduced in Griffin on Collision, page 699.

Let me read this paragraph:

"The signals for passing by the blowing of the whistle shall be given and answered by pilots in compliance with the rules in this part not only when meeting head and head or nearly so but at all times when the steam vessels are in sight of each other when passing or meeting at a distance within half mile of each other and whether passing to the starboard or port.'

* * * *

Q. Captain Molloy, are you familiar with that rule?

A. Yes, sir, I am.

Q. Now, in your experience and understanding does that rule apply to vessels passing between Manhattan and Governors Island?

A. Yes, sir."

The error of the District Court in failing to apply the Rules which required the tows to signal to the Rincon Hills is vividly emphasized by the foregoing testimony of the captain of the Long Branch, which shows that at the trial even he realized and admitted that he should have signalled to the Rincon Hills (437a).

5. As to the Rincon Hills turning to her right, off the Range and toward Dimond Reef when she blew the alarm signal.

The refusal of the District Court to find that the Rincon Hills turned to her right, off the Range and toward Dimond Reef, when she blew the alarm signal is decisively contradicted by the testimony of the ship's Pilot, Helmsman, Second Officer, and Master; and by the testimony of disinterested witnesses.

Pilot Rozwohlt

"Q. Will you tell us what you did next after you blew the one short blast and received or heard no reply blown to you? A. When I heard no reply from either vessel, I gave the alarm and ordered the engines to be stopped.

Q. Did you give any order with respect to the ship's wheel? A. Yes, sir. As the tow was progressing down and making a leeway as much as headway, I ordered the wheel to right." (40a)

Helmsman Wilcox

"Q. Mr. Wilcox, you stated in your testimony that the order before the pilot's hard left order was amidships, is that correct? A. That is right.

Mr. McKernan: I submit the witness did not so testify.

Mr. Haight: This is the witness's testimony a moment ago.

Q. Is that correct, Mr. Wilcox? A. That is right, sir.

Q. And before the amidships order what had the pilot ordered? A. Right wheel." (197a)

* * *

Q. Mr. Wilcox, coming back for a moment to the right wheel order which you testified preceded the order amidships, what is your best estimate of the length of time that you had the wheel right at that time? A. Well, it was over 30 seconds.

Q. And what is your recollection as to how far you put the wheel right on that occasion? A. Well, I would say about 2 or 3 turns, as best I can remember." (198a)

Second Officer Richard

"Q. At the time the pilot gave the stop order to the engines at 1225, will you tell us whether or not he

took any action with respect to any whistle signal? A. He blew a danger signal.

Q. Did he give any order with respect to wheel movement? A. Yes, sir, he did.

Q. What order did he give? A. Right wheel.

Q. Did you take any action yourself with respect to whether or not the right wheel order was carried out? A. Yes, sir, I did.

Q. Will you tell us what you did? A. Well, I repeated the order to the wheelsman and he repeated it after me and carried it out.

Q. Did you observe the wheelsman to see whether he carried out the wheel order? A. Yes, sir.

Q. What did you see him do? A. I saw him turn the wheel to the right, sir.

Q. Can you tell us how far he turned the wheel to the right? A. Well, I estimate a couple of turns, sir. (139a)

* * *

Q. Going back for a moment to the right wheel order you mentioned, will you tell us whether or not the Rincon Hills responded to that right wheel order? A. Well, as I recall, sir, she seemed to be swinging to starboard." (144a)

Captain Mullock

"Q. Captain, when you came and stepped into the wheelhouse from the chartroom on hearing the danger signal blown by the Rincon Hills, did you make any observation as to the state of the helm at that time? A. The helm was amidships—no, I just want to correct myself on that. I believe the helm was just being put amidships. It had been to starboard and it was just being put amidships.

Q. Now, when you stepped from the chartroom into the wheelhouse did you make any observation as to the ship's head? A. The ship's head appeared to be swinging to starboard. (108a)

* * *

Q. Captain Mullock, when the pilot gave the order amidships, after you came into the wheelhouse

and the chartroom, will you tell us whether or not at that moment the Rincon Hills was swinging? A. Yes, sir, she was swinging to starboard. (115a)

Captain Henry Hoffman, Master of the Governors Island Ferry Lt.-Col. Robert E. Shannon, which was in her slip on Governors Island.

"Q. After the tanker blew the alarm signal did you continue to observe her? A. Yes, sir, I did. She had moved up about a little abreast of our ferry slip, and at that time it looked like her engines were stopped because she seemed to be losing way, and the sand tow at that time was pretty close, and so was the carfloats.

Q. Now, as you observed the tanker at this time did you notice anything with respect to her bow wave? A. Her bow wave had cut down to almost a stop. It was just a ripple.

Q. Did you make any observation as to whether or not the tanker stayed on the range course? A. No, she was falling off slightly toward the reef; she was veering." (69a)

Captain McConnell, on the tug William Meseck, on the starboard side of the Rincon Hills.

"Q. When the Rincon Hills blew the alarm signal what at that moment was the position of your tug William Meseck? A. I was just still in position coming alongside like, still starting in alongside of her there.

Q. When the Rincon Hills blew the alarm signal can you tell us whether or not at that time she was on the East River range? A. Yes, sir, she was.

Q. After the Rincon Hills blew the alarm signal will you tell us in your own words what then happened. A. Well, as she came alongside——

Q. Speak loud and slowly. A. As she came alongside there, the ship started taking a nosedive to the starboard and I kept going with the ship. I

seen she was coming over, so I got away from her altogether.

Q. When you say a nosedive to starboard, are you speaking, with reference to the ship—— A. Ship went to the right." (183a)

Purser James Phillip

"Q. What kind of a signal was it? A. I heard a danger signal.

Q. When you heard that danger signal where were you? A. I was seated in my cabin.

Q. What were you doing at that time in your cabin? A. I was counting money, getting ready to pay off members of the ship's crew.

Q. What did you do when you heard the danger signal blown on the Rincon Hills? A. I picked up the money, put it in my pocket and went out on deck.

Q. Which deck did you go out upon? A. I went out on the midships deck on the starboard side." (158a)

* * *

"Q. After you came out on the starboard side of the amidships deck, did you make any observation with respect to that heading or course of the Rincon Hills thereafter? A. When I came out on deck we were headed towards Brooklyn, and then shortly thereafter we had started a swing to starboard." (161a)

In the face of all of the foregoing testimony showing that when the Pilot of the Rincon Hills blew the danger signal he also ordered her rudder put to right, and that this maneuver was carried out and took the Rincon Hills off the East River Range and toward Dimond Reef, it is clear error, we submit, for Judge Clancy to "refuse" (676a) to find that such right wheel order was given and executed when the Rincon Hills blew the danger signal.

Judge Clancy asserts (675a) that his reason for refusing to find that this right wheel order was given and

executed is because of a contradiction which Judge Clancy believed existed between the pilot's testimony at the Coast Guard hearing and at the trial. The opinion does not support this assertion by referring to any portion of the pilot's testimony at the Coast Guard hearing or at the trial. In fact, there was no such contradiction. The record shows (Exhibit 10) that at the Coast Guard hearing Pilot Rowohlt was *not interrogated* as to the right wheel order given and executed when the alarm signal was blown, since the attention of the Coast Guard Examining Officer was directed primarily to the helmsman's reaction, at a *later* time, in putting the wheel to the right when the pilot ordered hard left, at which time it appeared to the helmsman that the Rincon Hills was going to ram the Jersey Central tow, although collision was finally avoided by a few feet. Judge Goddard recognized that any suggestion of contradiction by the pilot was wholly unfair if at the Coast Guard hearing the pilot had not been interrogated as to the right wheel order given at the time of the alarm signal (516a-2, 516a-3) to show that Pilot Rowohlt was *not* interrogated on this point at the Coast Guard hearing, the transcript of his Coast Guard testimony was received in evidence as Exhibit 10 (516a-3).

Even if Pilot Rowohlt had contradicted himself on this point, which is *not* the situation, nevertheless the reason asserted by Judge Clancy for refusing to find the right wheel order, given and executed when Pilot Rowohlt blew the danger signal, is a wholly insufficient reason. The giving and the carrying out of this right wheel order is fully established by the testimony, above quoted, of *seven witnesses.*

It was held in the *Peter Rinelli,* 252 F. 211 (1922) that the testimony of other navigators is vitally important. And, in *Coney Island-Exporter,* 131 F. (2d) 902 (1942) the Second Circuit held that even if the master of a

ship becomes confused or contradicts himself on a certain point, that point may be established by the testimony of *other* witnesses.

It is evident that if he had found that such right wheel order was given and executed, then Judge Clancy could not have exonerated the tows from fault in crowding the Rincon Hills off the Range and onto Dimond Reef.

The refusal of Judge Clancy to find the right wheel order which the Pilot of the Rincon Hills gave when he blew the danger signal is all the more surprising because the giving of such right wheel order was confirmed by the helmsman *at the Coast Guard hearing,* and again at the trial by the helmsman and the other witnesses above named. At the trial, *it was the counsel for the Metropolitan tow* who had the helmsman *confirm, on cross examination,* not only that the Rincon Hills' pilot gave a right wheel order when he blew the danger signal and that the helmsman carried it out, but that such right wheel order given by the Pilot and carried out by the helmsman *might even have been a hard right order* (516a-5, 516a-6), which would emphasize even more the fact that the Rincon Hills was forced off the Range and toward Dimond Reef in order to avoid collision.

6. As to the tows embarrassing the navigation of the Rincon Hills.

The opinion of the District Court (672a) asserts "The Rincon Hills never at any time navigated with respect to the Metropolitan tow. There was nothing in the conduct of the Long Branch tow that contributed in any way to the grounding."

As to the Metropolitan tow, the foregoing assertion by the Court below appears to be based primarily upon the Court's assertion that the master of the Rincon Hills, "never saw the Metropolitan float. If the master of the vessel

could not see Metropolitan then it means that tow was never in the picture." (675a)

The Court's conclusion that the Metropolitan tow was "never in the picture" is a complete *non sequitur*, because Captain Mullock, master of the Rincon Hills, was in the chart room and did not enter the wheelhouse until after Pilot Rowohlt had blown the alarm signal (108a). Captain Mullock testified that after entering the wheelhouse his attention was directed toward the Jersey Central tow, which was on the starboard bow of the Rincon Hills and angling across the bow of the tanker (105a). Captain Mullock *did not testify* that "he never saw the Metropolitan float". On the contrary, when pressed upon the point, Captain Mullock testified that he did have some recollection of seeing the Metropolitan tow (516a-4). Since the Metropolitan tow was ahead of the Jersey Central tow, it can be readily understood that the Metropolitan tow, when Captain Mullock came into the wheelhouse, had already crowded the Rincon Hills, with the result that the Jersey Central tow which still remained on the starboard bow of the Rincon Hills became quite naturally the primary object of Captain Mullock's attention.

As to the Jersey Central tow, the assertion by the Court below that there was nothing in the conduct of this tow that contributed in any way to the grounding of the Rincon Hills appears to be primarily based (677a) upon Judge Clancy accepting the testimony of Captain Molloy, of the tug Long Branch, notwithstanding the many errors and contradictions in his testimony, some of which are recorded even in the District Court's opinion.

In view of the fact that he did not see or hear a single witness testify, it is all the more surprising to find the statement made by Judge Clancy in his opinion (677a) "Molloy was a straightforward witness who gave direct responsive answers." As an effort to persuade the Circuit Court not

to reverse, by the inference that Judge Clancy was in a better position to pass upon the manner and content of Molloy's testimony, the statement must fail, because the Court of Appeals had before it the *very same* record as was before Judge Clancy. As an expression of view as to the manner and content of Molloy's testimony, the statement of Judge Clancy is seen to be inaccurate, because the record shows that Molloy was neither straightforward nor direct in his testimony. In fact his own testimony shows that the Jersey Central tow did embarrass the navigation of the Rincon Hills.

Thus, when he testified at the Coast Guard Investigation, Molloy stated that the Long Branch tow *cleared the Rincon Hills by only 70 feet*, and Molloy drew a diagram showing the relative positions of the tow and of the Rincon Hills as they cleared, such diagram being in evidence as Exhibit 70, and a reproduction attached hereto as Appendix F.

At the trial, Molloy sought to change his estimate of the distance by which the tow cleared the Rincon Hills, claiming that he had realized immediately after the Coast Guard hearing that *his 70 feet estimate was wrong* (413a), but admitting that he had done nothing to inform the Coast Guard in that respect (415a), even though he knew that the Coast Guard were concerned with his license and that of Pilot Rowohlt of the Rincon Hills (416a).

Molloy sought at the trial to increase the distance by which the Long Branch tow cleared the Rincon Hills to 200 or 175 or 150 feet (414a).

Not even this increase satisfied counsel for the tows, and on "cross-examination" counsel for the *Metropolitan tow* put the leading question that the Long Branch tow was in the middle of the distance between the Rincon Hills and the Manhattan Piers, with which suggestion *Molloy readily agreed* (516a-6—516a-9).

The District Court's opinion does not explain how or why Molloy's answer of 200 feet was accepted by Judge Clancy as the "straightforward", the "direct", the "responsive" answer.

It is wholly clear that the 200 feet estimate given by Captain Molloy at the trial as to the clearing distance between the Long Branch tow and the Rincon Hills cannot be relied upon, because on final cross-examination Molloy admitted that he could not remember the distance between the Long Branch and the Rincon Hills, or the distance between the Long Branch and the Manhattan piers—"whether there was more room on the starboardhand or on the port, I couldn't remember" (432a).

Accordingly, the best estimate which Molloy gave at any time was his 70 feet estimate given at the Coast Guard Investigation, and confirmed in his sketch, Exhibit 70, and such a small clearing distance shows beyond any doubt that the Long Branch *did* embarrass the navigation of the Rincon Hills. Even Molloy himself admitted that 70 feet was not enough room to maneuver (414a).

Captain Smith, Manager of respondent's Marine Department, was not told by Molloy that Molloy later believed that the 70 feet estimate he gave to the Coast Guard was not correct (453a). In fact Captain Smith accepted the *70 feet estimate* as being correct, and *continued at the trial to accept it as correct* (454a).

The testimony of *ten witnesses*, in addition to Captain Molloy, shows beyond doubt that both the Metropolitan tow and the Long Branch tow *did* embarrass the navigation of the Rincon Hills.

Pilot Rowohlt

> "Q. Captain Rowohlt, the last questions, in reply thereto you had placed the [redacted]els in their respective positions of the craft concerned at the time you blew the danger signal and stopped the Rincon Hills engines and ordered a right wheel.

Now, will you tell us, what did you do after you took that action, and how did the situation develop? A. Well, as we were progressing up towards the tows, tows were coming down, heading in a northwesterly direction, the both tows, and they were making about as much leeway as they were headway, and I was watching the bearings, changing the bearings, and it looked to me as though if I had stayed on the direct course or on the range that I had a risk of collision. (42a, 43a)

Captain Mullock

"Q. Now, Captain, can you tell me whether, if the helm had not been thrown either to the right or to the left, and if the engines had not been put full ahead at the time that you heard the first hard left, full ahead order given, but if the ship, the Rincon Hills had been kept amidships, or not it is your opinion that there would have been any grounding, under those conditions, of the Rincon Hills? A. I still consider she would have grounded, yes, under those conditions. That is, provided there was no movement made of the engine, and no movements made of the wheel, and the ship had continued losing her headway, and with the current setting on the shoal, I believe she would have grounded. It is my opinion that she would have grounded just the same.

Q. Well, if there had been no change of the rudder either to the right or to the left, if the engine had been put full ahead, then do you still say that there would have been a grounding of the Rincon Hills? A. I believe so, yes.

* * *

A. Yes, sir. She would have still gone on the reef in that case if she continued going ahead.

Q. So, then, as I understand the situation, from the time that you entered the pilothouse two minutes prior to the grounding, there was nothing that could have been done that would have saved the Rincon Hills from going on the reef; is that your testimony

A. Yes, sir, there could have been something done. We could have rammed down that barge and tugboat, possibly drowned a half a dozen men. If you would have wanted us to do that, why, you should have sent us prior orders to do it. (124a)

* * *

'cond Officer Richard

The Jersey Central tow cleared the Rincon Hills by such a small margin that the Watch Officer was expecting there would be a collision, and he was ready to take immediate action to assist persons in the water after collision. (516a-4, 615-5)

'urser Phillip

"Q. After you returned to your room what occurred next? A. I sat down at my desk again and started to count money once again. I had—just after I was seated I heard a scraping sound and then the ship lurched to starboard.

I immediately picked up my money again and ran out on deck. I looked over the side—well, as I ran out on deck people were shouting the ship was aground. My first impression was that we had come into collision with the tug and carfloat. That was the first thought I had when I felt the scraping sound.

Then I ran out on deck and heard people shouting that the ship was aground, and I saw oil coming out on the surface of the water. That was on the starboard side that I saw the oil.

I then ran across to the port side of the amidships deck and noticed that we had cleared the tug and carfloat, that we had not come into collision with the tug and carfloat." (162a)

Captain Henry Hoffman, Master of the Governors Island Ferry Lt.-Col. Robert E. Shannon.

"Q. When the ship blew the alarm signal was there anyone else with you in the pilothouse or on

the offshore end of your ferry? A. No, sir, there wasn't.

Q. Did you take any action as to calling anybody to you? A. Yes, sir. I rang the bell—we have a bell from one pilothouse to the other, which is a starting bell—and I immediately hit that four times for the quartermaster to look my way, that I want him. And when he came to the window where he could see me on the New York Pilothouse, I motioned to him to look at the mix-up that was going—about to happen, and he comes out on a little landing outside the pilothouse and stood there watching it the same as I did.

Q. Who was your quartermaster on this occasion? A. Captain Benjamin Parrillo.

Q. Now, did you continue to observe the various crafts you have mentioned? A. Yes, sir, I did.

Q. Will you tell us what happened as you observed it from the time that the ship blew the danger signal? A. Well, I looked at the situation and I figured right off the reel, the captain with the floats——

The Court: What was that?

Mr. Haight: Speak louder.

A. (Continuing) I figured the captain with the floats was going to cross the tanker's bow, and if he didn't get hit he was going to be mighty lucky, because they were very, very close; and when he crossed the tanker's bow I didn't think he was really going to do it.

The Court: You are talking about the top of the tug and the carfloat?

The Witness: Yes.

And just before he crossed the bow, the last thing I saw was part of a sandbarge in the same site as the tug, and I was wondering how he was ever going to do it." (70a, 71a)

Whelan, Quartermaster of the Ferry Ellis Island

"Q. After the Ellis Island ferry came in the position you described off the port quarter of the tanker, will you tell us what developed thereafter? A. We were proceeding along on our course, and I noticed this sand tow coming on down the East River, and this carfloat to the port side of the tow—how far off the tow I don't know—but toward the stern of the tow, and somebody called my attention to it that I had called Captain O'Toole's attention——

Mr. McKernan: I didn't get the name.

A. (Continuing) I had called Captain O'Toole's attention to the situation and referred to it as 'Watch this, Captain, this is going to be cute,' and we started then veering away from the tanker to make our landing in Slip 7." (82a)

* * *

Q. Will you tell us as you proceeded from first sighting the sand tow and carfloats up to the time when you angled for Slip 7, as you mentioned, did you have the tug and the sand tow scows in your vision all the time? A. When I first saw that they were to the port side of the ship up ahead, heading straight on out. When they started making their swing, that is when I mentioned to Captain O'Toole, 'Watch this,' that it is going to be cute.

Q. Are you referring to the sand tow or the carfloats now? A. *Both of them.* Both started swinging on down with the tide.

Q. Now, as you proceeded did you have the sand tow in your vision all the time? A. I had the sand tow in the vision all the time except possibly maybe half of the last scow was across the bow of the ship at one time I had noticed, and we had lost sight of the carfloat for possibly half a minute, and when we were angling from this here tanker, abaft of the wheelhouse of the tanker, we angled in to get away from that mess, then I no-

ticed this carfloat come shooting across the bow of the ship, and the last view I had of that close situation was that the tanker was heading directly amidship on the carfloat.

Q. Will you explain a little more what you meant when you said a moment ago that you lost sight of the carfloat? A. She had come in—being swept down with the tide, both the sand scows and the float, and at that position we were at I had lost sight of the float being swept down with the tide. I didn't know where he was going, whether he would possibly go on the starboard side of the ship or where he went. It was out of my view." (83a)

* * *

Q. When the carfloats came back in your vision again, what was their position relative to the tanker? A. They seemed to be 90-degree across the bow of that ship the way I seen it." (84a)

Captain Tuttle, master of the Staten Island Ferry, Gold Star Mother

"Q. Now, at the time you first saw the carfloat tow will you tell us whether or not you could also see the tanker? A. Yes, sir, I could.

Q. What was the relative positions of the tanker and the carfloat tow? A. They were very close. The carfloat tow was across the bow of the tanker at about a 45-degree angle.

Q. From which side of the tanker to which side of the tanker was the carfloat tow proceeding when you said she across the tanker bow? A. She was coming from the starboard side of the tanker toward the port side.

Q. Can you estimate the distance between the stem of the tanker and the carfloat when you first observed them in that position? A. It looked very close to me; I would say 20 or 30 feet, possibly, from that angle.

Q. I am speaking of the time when you first saw the carfloat tow in the position you have described.

Did you see any other craft? A. Yes, there was another tow ahead of the carfloat tow.

Q. What kind of a tow was this other tow? A. At this point I could not specifically say what the tow was.

Q. Can you tell us whether or not it was a hawser tow? A. It was a hawser tow, yes. (492a, 493)

* * *

Q. Will you tell us how the two tows and the Gold Star Mother proceeded from the position as shown in your diagram, sketch 111? A. How they proceeded?

Q. Yes. Don't mark the sketch. A. It squeezed in along the other tow, the hawser tow, and both proceeded up toward the North River.

Q. What side of the hawser tow was the carfloat tow on when it squeezed in in that way? A. It was on the port side of the tow.

Q. By that you mean the port side of the hawser tow? A. Of the hawser tow, correct." (498a)

Captain McConnell, on the tug William Meseck

"Q. When you first observed the Metropolitan sand tow whereabouts was she? A. She was coming from—starting over from about Pier 9, Brooklyn, headed for the New York shore.

Q. At that time did you see the Jersey Central tug and carfloats? A. Yes, sir, she was right around the stern of the Metropolitan.

Q. What was the relation as to position between the Jersey Central tug and tow and the Metropolitan tug and sand tow? A. Well, the Jersey Central was a little over to Brooklyn more and he was coming up alongside of the Metropolitan on his port side.

Q. On the port side of the Metropolitan tow. Did you observe what the Metropolitan tug was towing. A. Yes, I think it was three sand scows he had on a hawser.

Q. How were those sand scows made up? A. Strung out straight on a hawser.

Q. What was the relationship between the sand scows? A. One behind the other.

Q. At the time the Rincon Hills blew the alarm signal can you state what then was the position of the carfloat tow? A. Well, he was up a little ways, going, just about going across the bow of the ship, getting on the other side there.

Q. When you say going across the bow of the ship, will you state from which side of the ship he was crossing? A. He was going from starboard, going over to the port side, coming from Brooklyn, headed for New York.

Q. When you say from starboard, do you mean from the starboard side of the Rincon Hills? A. That is right." (184a, 185a)

Captain Hutton, of the tug Metropolitan No. 2

"Q. Captain, is it not a fact that the Jersey Central tug and carfloats overtook and passed your tug and tow 200 feet off your port side and between the Rincon Hills and your tow? A. That is right." (336a)

Captain Reichert, master of the tug Metropolitan No. 3

The statement of Capt. Reichert, given to his own counsel 17 days after the stranding, shows definitely that both the Metropolitan tow and the Jersey Central tow crowded the Rincon Hills. Capt. Reichert's statement also shows that the crowding of the Rincon Hills by the Jersey Central tow was promptly recorded in the statement of Capt. Reichert. While he did not directly acknowledge that the Metropolitan tow also crowded the Rincon Hills, this is to be expected. However the facts recorded in Capt. Reichert's statement speak for themselves, and as above noted, show that the Metropolitan tow most certainly did crowd the Rincon Hills. The Metropolitan No. 3 was following astern of the Metropoli-

tan tow and somewhat to her port. The Metropolitan No. 3 was also astern of the Jersey Central tow, but that tow was somewhat to port of the Metropolitan No. 3.

Captain Reichert's sworn affidavit contains (page 2) the following vital statement:

> "When I arrived about abreast of the tanker Rincon Hills, she ran aground on Dimond Reef. At this time I was about 150 yards off the Rincon Hills so that there was this much clear water between the port side of the Rincon Hills and the port side of the Metropolitan No. 3. At this time the tug Long Branch and her floats were ahead of me but off to my port."

Since the East River Range Line is 300 feet from Dimond Reef, Capt. Reichert's statement gives a definite fix of the positions of the two tows *at the very moment when the Rincon Hills grounded*. At that moment, the Metropolitan No. 3 was only 150 yards, or only 450 feet to the north of Dimond Reef. This puts the Metropolitan No. 3 on the wrong side of the channel between Dimond Reef and lower Manhattan, since the center line is 480 feet from Dimond Reef.

The Jersey Central tow, at the moment when the Rincon Hills grounded, was—in the words of Capt. Reichert—"ahead of me *but off to my port*". This puts the Jersey Central tow *on the Range line* or even closer to Dimond Reef.

The Metropolitan tow was a little to starboard of the Metropolitan No. 3, and therefore was about on the center line of the channel between Dimond Reef and lower Manhattan.

The vital significance of the foregoing positions, as established by the statement of Capt. Reichert, is that the Metropolitan tow and the Jersey Central tow were *still in the wrong part of the channel* at the very moment when the Rincon Hills stranded on Dimond Reef. Having been unable

to get over to the right part of the channel during the interval which elapsed between the Rincon Hills giving the danger signal and the tanker going aground, there can be no doubt that both tows crowded the Rincon Hills and embarrassed her navigation as they approached her and finally cleared her, only because of the avoiding action taken by the tanker.

That the tows *did* embarrass the navigation of the Rincon Hills is vividly shown by the fact that when the Jersey Central tow cleared the port bow of the Rincon Hills, Pilot Rowohlt, on the bridge of the Rincon Hills "hollered over to the Jersey Central and I—pretty strong language—I wanted to know *what he was trying to do, to run the ship ashore?*" (46a). Rowohlt did not receive any answer from those in the pilot house of the tug (46a).

While the foregoing testimony of Rowohlt was in restrained language, other witnesses revealed the "pretty strong language" to which Pilot Rowohlt referred in his testimony. Captain Mullock, with special permission from the Court, testified that Pilot Rowohlt hollered "You son of a bitch, what are you trying to do, put us on the rocks?" (113a); and this was confirmed by Second Officer Richard (152a). The clearance between the Rincon Hills and the Jersey Central tow was estimated at 10 feet (Henry Hoffman 72a; Edward Hoffman 98a); 10 to 20 feet (Whelan 92a); 20 feet (Rowohlt 44a); 20 to 25 feet (Richard 146a, 148a); 25 to 30 feet (Mullock 113a); 20 to 30 feet (Tuttle 493a); 30 feet (Kuinlivan 205a); 50 feet (Wilcox 201a); 70 feet (Molloy at Coast Guard Hearing 409a, and Exhibit 70).

The clearance between the Rincon Hills and the Metropolitan tow was estimated at 40 feet (Edward Hoffman 97a); 100 feet (Rowohlt 43a); to Henry Hoffmann, on the Ferry *Lt. Col. Robert E. Shannon*, it appeared that the Metropolitan tow and the Jersey Central tow were "in the same site" (71a).

APPENDIX B

Explanatory note and copy of Exhibit 8, Chart marked by Captain Rowohlt, Pilot of the Rincon Hills.

The enlarged chart used for this exhibit (48a) is an enlarged reproduction of the area comprising the lower part of Manhattan, the upper portion of Governors Island and the Brooklyn shore. The enlargement was made from Exhibit 1, U. S. Coast and Geodetic Survey Chart No. 745, of the Hudson and East Rivers, 10th Edition, August 13, 1951, corrected to November 19, 1951.

The markings on Exhibit 8 are those of Captain Alfred C. Rowohlt, Pilot of the Rincon Hills, who was conning the vessel at all the times in question (35a).

Pilot Rowohlt had brought the Rincon Hills up the Main Ship Channel to the West of Governors Island and had turned in towards the East River, or Deep Water, Range. The Range is located by lining up two lights on the Brooklyn shore; one on the end of Pier 11, marked "F R" and the other on a building behind Pier 9, marked "F G" (37a). The position of the Rincon Hills is shown by a pencil outline of the vessel marked (A). The Rincon Hills was slightly north of the Range Line to allow for the southward set of the current in the Hudson River.

When the Rincon Hills was in position (A), Pilot Rowohlt first saw the Metropolitan No. 2 and sand tows off Pier 9, East River, as shown on the upper section of the exhibit, and labeled as such. The Long Branch and her carfloats were behind the Metropolitan No. 2.

The Rincon Hills advanced to the position marked "Rincon Hills 1" (38a), at which time Pilot Rowohlt gave a one-blast signal on the whistle of the Rincon Hills. The corresponding position of the Metropolitan No. 2 at the time of the one-blast is designated as "Met 1" with her last scow on the Range line; the corresponding position of the Long

Branch is designated as "CRR 1", which at that time had the bow of her port carfloat on the Range line (39a). Neither tug answered the Rincon Hills' one-blast signal (40a, 48a).

The Rincon Hills proceeded to the position marked "R.H. 2" and then sounded the alarm signal (40a). The corresponding positions of the other craft are shown as "Met 2" and "CRR 2". The alarm was not answered by either tug.

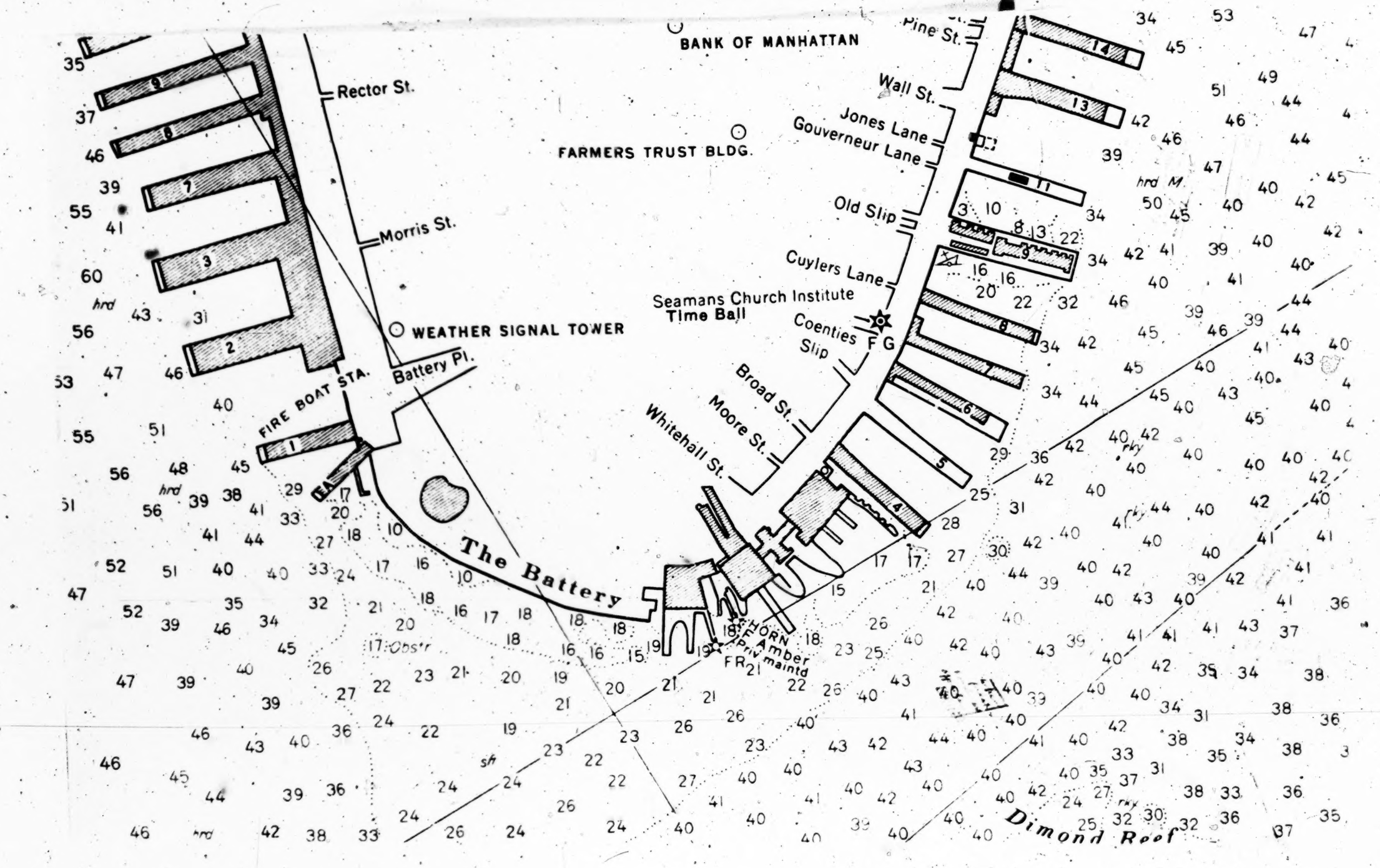
Pilot Rowohlt's estimated position of the Rincon Hills when aground is designated by the word "aground" on Dimond Reef. Actual bearings showing the final grounded position were plotted on Exhibit 36.

On cross-examination, working back from the estimated position aground, another outline of the Rincon Hills was marked to show the estimated position of the Rincon Hills and the Long Branch "When the pilot house (of the Long Branch) was opposite Bridge" of the tanker (50a).

Outside eye witnesses estimated that the Long Branch just barely cleared the Rincon Hills; 10 feet—Henry Hoffmann, (72a) and Edward Hoffman, (98a); 10 to 20 feet—Whelan, (92a); and, 20 to 30 feet—Tuttle, (493a).

A rough pencil curved line extends from near Pier 4, Manhattan, marked A, to a point off the old Ellis Island ferry slip, adjoining the Battery, marked B. This represents the area referred to by Pilot Rowohlt as "abeam the South Ferry area" (49a, 50a).

A rough pencil curved line extends above Governors Island, also marked A-B, to designate the northwest corner of Governors Island as referred to by Pilot Rowohlt.


BANK OF MANHATTAN
FARMERS TRUST BLDG.
WEATHER SIGNAL TOWER
Rector St.
Morris St.
Battery Pl.
FIRE BOAT STA.
The Battery
Pine St.
Wall St.
Jones Lane
Gouverneur Lane
Old Slip
Cuylers Lane
Seamans Church Institute
Time Ball
Coenties Slip
Broad St.
Moore St.
Whitehall St.
HORN
Amber
Priv maintd
FR21
Dimond Reef

BANK OF MANHATTAN

ERS TRUST BLDG.

Pine St.

Wall St.

Jones Lane

Gouverneur Lane

Old Slip

Cuylers Lane

Seamans Church Institute

Time Ball

Coenties Slip

F G

Broad St.

Moore St.

Whitehall St.

HORN
Amber
Priv maintd
FR 21

Cranberry St.

Orange St.

Pineapple St

Clark St.

Furman St.

F G

F R

Joralem

State

Atlantic

14 13 11 9 6 5 4

3 10 8 13 22 16 16 20 22 32

6 6

6 8 9 9½ 10 11 12 15 16 17 18

Diamond Reef

HORN

Ventilator

TANK

GOVERNORS ISLAND

GOVERNORS ISLAND 12 HORN 2 FR

Nautical Mile

0 ½

Yards

100 0 500

Dimond Reef

GOVERNORS ISLAND

HORN

Ventilator

TANK

2FR

Nautical Mile

Yards

0 500 1000

CHANNEL

Irving St.

Cable

Van Brunt St.

Sedgewi

Degraw

Sacke

FG 94 ft vis 15 m

Uni

Pre

Ca

Sumn

Hamil Ave.

APPENDIX C.

Explanatory note and copy of Exhibit 14, Chart marked by Captain Henry G. D. Hoffmann, Master of the Governor's Island Ferry *Lt. Col. Robert E. Shannon.*

The enlarged chart used for this exhibit (75a) is an enlarged reproduction of the area comprising the lower part of Manhattan, the upper portion of Governors Island and the Brooklyn Shore, made from Exhibit 1, in the same manner as that used for Exhibit 8.

The markings on the exhibit are those of Captain Henry G. D. Hoffmann, master of the Governor's Island ferry *Lt. Col. Robert E. Shannon.*

The ebb tide route of the ferry from Manhattan to Governor's Island is marked in a heavy curved line drawn in pencil (55a, 56a).

Captain Hoffmann was aboard the ferry in her Manhattan slip and was about to navigate the ferry from the Battery to Governor's Island on the 12:15 trip. This position of the ferry in her Manhattan slip is marked "G. I. Ferry 1" (58a, 59a). At this time Captain Hoffmann saw the Rincon Hills in the approximate position marked "Tanker 1" (61a), which appears on the lower right section of Exhibit 14; a Meseck tug (C. Hayward Meseck) was off the Battery (60a); the Metropolitan No. 2 and the sand tow were sighted in the center of the East River, about off Pier 6, Manhattan, in the approximate position marked "Sand Tow 1", which is on the upper section of the exhibit (61a). Captain Hoffmann did not see the Long Branch at that time, as it was apparently up-stream behind the scows and out of his line of vision.

Thereafter the ferry left the Battery en route to Governor's Island. When the ferry was in a position approximately half-way across and on the Range line, marked

"G. I. Ferry 2"; Captain Hoffmann saw the Rincon Hills north of the Range line and headed in a general easterly direction, in the approximate position marked "Tanker 2"; and at that time he saw that the Metropolitan. No. 2 and her sand scows had been swept down stream across and center of the deep water channel, this position of the Metropolitan tow being marked (65a) Sandtow 2, with the last scow south of the Range line and the center scow on the Range line itself (64a, 65a).

The ferry continued across and docked in her slip on Governor's Island. This position marked "G. I. Ferry 3". The Rincon Hills, at that time, was on the range line in an approximate position marked "Tanker 3". It was at this time and in this position that Captain Hoffmann heard the Rincon Hills sound a single blast. The Metropolitan No. 2 (Captain Hutton admits (310a) hearing the signal and not replying, continued to be swept down by the ebb current out of the East River and at the same time was counteracting the current by pulling towards the Manhattan Ferry slips, as shown by "Sand Tow 3" (66a).

The position, at this time, of the Jersey Central tug Long Branch with a carfloat on each side is marked "CRR 3" (68a) and appears just below the word "Dimond". The Long Branch was well below the Range line and heading across the bow of the Rincon Hills. The Long Branch appeared to have been coming out of Buttermilk Channel. Another outside witness, Captain Tuttle made the same observation (502a).

Positions numbered 4 were observed by Captain Hoffmann from the forward end of his ferry, which was still in her Governor's Island slip. The Rincon Hills had just blown the alarm. Captain Hoffmann saw the Rincon Hills in the position marked "Tanker 4". The Metropolitan No. 2 and scows, and the Long Branch and carfloats had reached the positions marked "Sandtow 4" and "CRR 4" respectively.

Upon cross-examination, an outline was marked on the exhibit, across the face of Dimond Reef, to show where Captain Hoffmann approximated the Rincon Hills position when aground.

Estimates of the velocity of currents are as given upon cross-examination and are marked in numbers at various points along the ferry's route.

Pencil letters "T" and "X" with arrows appear at the Northeastern Edge of Dimond Reef, to denote a split in the tide or current. some of which flows down Buttermilk Channel and some down the deep water channel.

The positions of the various vessels marked "Tanker 1", "Sand Tow 1" etc. were based upon Captain Hoffmann's observations by eye in relation to the East River Range and the shore line.

On cross-examination Captain Hoffmann was asked to estimate the distance in feet between the Rincon Hills and Governors Island. Then, the exact distance estimated by him was laid off on the chart and marked "Tanker 5" and "Tanker 6".

The chart bears a label "2nd Stone wall of Ellis Island Ferry (rack)". The slip was not being used by the Ellis Island Ferry at the time. The Ellis Island Ferry was using slip 7 (written in pencil just west of Pier 4, East River). When inverted, the "7" appears to be a "6".

Lines A-B and C-D in heavy pencil, were drawn upon cross-examination, and then distances were measured.

The above came about when Captain Hoffmann said that the Metropolitan No. 2 and sand scows in positions 2, 3 & 4 were drawing closer to the pier ends (75a). Mr. Hanan arbitrarily picked out the East-West parallel (75a) and said, "That gives us a good straight line to the ends of the piers * * *" (75a), and then he measured distance at right angles *to the East-West parallel* and not *ahead* in the manner the tug and scows were proceeding as affected by a

southwesterly current (76a). Actually, the East-West parallel does *not* run parallel to a line drawn through the end of Pier 4 and the end of the Staten Island ferry long rack; nor does it run parallel to the line of the East-River Range.

The actual course made good by the Metropolitan tow over the ground was plotted by Captain Dwyer on Exhibit 56.

Court
of N. Y.
MAR 16 1955

Rector St.
Morris St.
Battery Pl.
Pine St.
Wall St.
Jones Lane
Gouverneur Lane
Old Slip
Cuylers Lane
Coenties Slip
Broad St.
Moore St.
Whitehall St.
BANK OF MANHATTAN
FARMERS TRUST BLDG.
WEATHER SIGNAL TOWER
FIRE BOAT STA.
Seamans Church Institute
Time Ball
The Battery
Obstr'd
Dimond Reef

BANK OF MANHATTAN

UST BLDG.

Pine St.

Wall St.

Jones Lane

Gouverneur Lane

Old Slip

Cuylers Lane

Seamans Church Institute

Time Ball

Coenties Slip

F G

Broad St.

Moore St.

Whitehall St.

Harbor Anchorage

FR

Diamond Reef

Cranberry St.

Orange St.

Pineapple St

Clark St.

Furman St.

F G

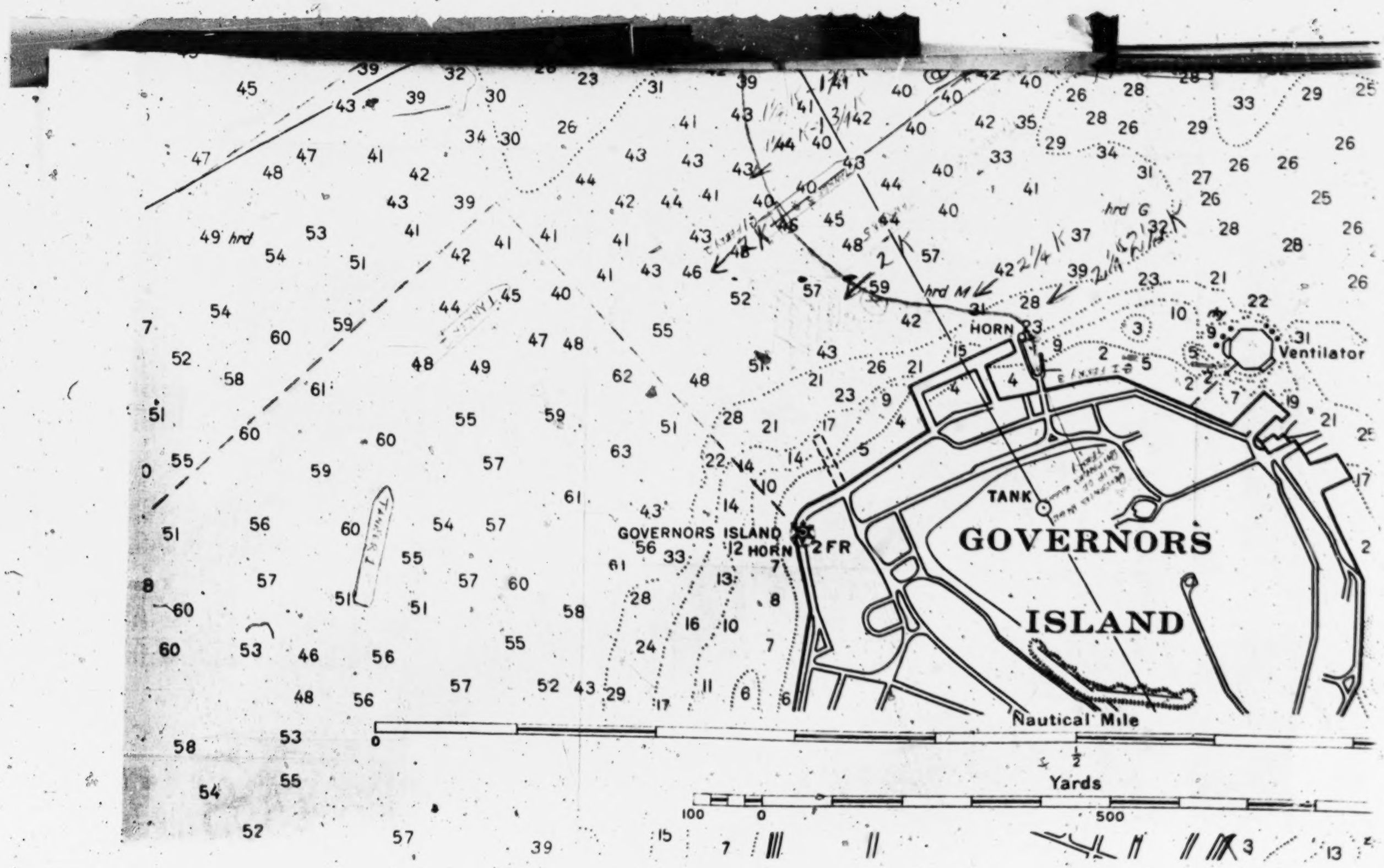
F R

Pierre

Joralem

State

Atlantic


HORN
Ventilator
TANK
GOVERNORS
ISLAND
GOVERNORS ISLAND
12 HORN
2 FR
Nautical Mile
0
1/2
Yards
100
0
500

GOVERNORS ISLAND

TANK

HORN

Ventilator

hrd G

hrd M

Nautical Mile

½

Yards

500

1000

12 HORN

2 FR

24 BELL 3 REF

NEW CHANNEL

Irving St.

Cable

Van Brunt St.

Degraw

Sacke

FG 94 ft vis 15 m

Uni

Pre

Ca

Summ

Hamil

Ave.

APPENDIX D

Copy of Exhibit BBB, sworn statement given to Metropolitan counsel by Captain Hutton, of the tug Metropolitan No. 2, only 17 days after the grounding of the Rincon Hills.

Amended Statement of CHARLES HUTTON

Master of the Tug METROPOLITAN NO. 2

Dated NOVEMBER 26, 1951

STATE OF NEW YORK,
COUNTY OF NEW YORK, } SS.

CHARLES HUTTON, being duly sworn, deposes and says: That at all times hereinafter mentioned he was master of the tug METROPOLITAN NO. 2, which at all times hereinafter mentioned was in all respects tight, strong, staunch and seaworthy and properly manned and equipped.

On November 26, 1951 the M/T METROPILITAN NO. 2 left stakeboat #2 off College Point with three loaded scows in tow bound for stakeboat #1 off the Statue of Liberty. The METROPOLITAN NO. 2 had out two hawsers approximately 15 fathoms in length. The scows were made up tandem fashion one behind the other. I do not recall at this time their exact order, but I had in tow the loaded scows GG-202, GG-104 and GG-150. These scows are approximately 112 feet long and while in tow are made up close to each other bow and stern.

The METROPOLITAN NO. 2 and her tow proceeded from stakeboat #2 down the East River without incident. After passing below the Brooklyn Bridge the tow was favoring the middle of the river and when the tow was about off Pier 9, New York I observed a tanker, which later proved to be the HINCON HILLS. I should judge that this tanker at that time was about abeam of the light on the northerly end of Governors Island and approximately 1000

LH:EB

feet off the light. The METROPOLITAN NO. 2 and her tow continued down the river and when approaching or in the vicinity of Pier 5 we began to pull in toward South Ferry so as to be in a position to round the Battery. This was about 1:00 p.m. on November 26, 1951, with the weather clear, a light northwest wind that had no effect on the navigation of my tow and the tide in the East River was just about low water slack. The tide was still running ebb out of the North River and in order to make proper allowances for the North River tide we pulled in towards the Battery when going by so that we would not be set down too much by the North River tide. The METROPOLITAN NO. 2 proceeded along without incident and when the tow was approximately 300 or 400 feet off of Pier 4, New York I heard the tanker RINCON HILLS sound a one-whistle signal. The tanker at this time was between the Battery and Governors Island and apparently swinging to her right in order to make the necessary turn and to get on the East River deep water range. Due to the position of the tanker and the METROPOLITAN NO. 2 I knew this signal was not meant for the METROPOLITAN NO. 2 and looked around to see for what vessel the signal was intended. I observed the tug LONG BRANCH with a carfloat on each side up off Pier 9 and out in about the center of the river bound down the river and concluded that the tanker RINCON HILLS was signalling to the tug LONG BRANCH. I do not recall at this time whether or not the tug LONG BRANCH sounded any signal in reply.

The tug METROPOLITAN NO. 2 continued on her way and an Ellis Island ferryboat bound from Ellis Island to the Battery passed a couple of hundred feet off my starboard side when I was

about off the ferry slips. It was not necessary for the Ellis Island ferryboat or the METROPOLITAN NO. 2 to sound any signals to carry out this passage as our courses and distances apart made it perfectly safe for us to pass without making any passing agreement. The METROPOLITAN NO. 2 continued on and when about 400 or 500 feet off the St. George ferry rack which has a siren on the end, the tanker RINCON HILLS was off to the port side of the tail end of my tow. I should judge that there was at least 600 feet between the port side of my tow and the port side of the RINCON HILLS. There was plenty of room for us to pass each other and the METROPOLITAN NO. 2 in no way interfered with the navigation or the course of the RINCON HILLS. The tug LONG BRANCH continued on down the river and overtook the tug METROPOLITAN NO. 2 and her tow and passed us on our port side. She passed about a distance of 200 feet off our port side and between the RINCON HILLS and the tow of the METROPOLITAN NO. 2.

The METROPOLITAN NO. 2 continued on towards stakeboat #1 and when well beyond the Battery and over toward stakeboat #1 the tug METROPOLITAN NO. 3 arrived alongside my tow and took a scow out of the tow to deliver it to destination. The METROPOLITAN NO. 2 continued on without incident to stakeboat #1 off Liberty Island.

After the aforesaid occurrences I heard the man who was apparently the pilot on the RINCON HILLS and whose name, I believe, is Woodhall or Woodhull and is master of the tug MILLIAM MESECK, which tug was following the tanker up the harbor but not made fast to the tanker, call his office and broadcast over the

air that the tanker RINCON HILLS had gone aground on Diamond Ke and the reason for her going aground was that the wheelsman or quartermaster put the wheel of the tanker the wrong way, putting it to the right, with the result that the tanker ran aground. I also heard Eddie Hoffman, the captain of the tug C. HAYWOOD MESECK, which was waiting off the Battery for the RINCON HILLS, cut in and state that the tug METROPOLITAN NO. 2 with three scows in tow and the tug LONG BRANCH with two carfloats in tow were in the vicinity.

The METROPOLITAN NO. 2 in no way interfered with or crowded the tanker RINCON HILLS and at all times was at a safe distance away from the RINCON HILLS.

SWORN to before me this :
13th day of December, 1951. :

Capt Charles Hutt

Elizabeth Soffel

ELIZABETH SOFFEL
Notary Public for the State of New York
Qualified in [illegible]

County Clk. No. [illegible]
Clerk's No. [illegible]
County Cls. & Ltd. [illegible]
Commission Expires March 30, 1953

3

APPENDIX E

Copy of Exhibit YY, sworn statement given to Metropolitan counsel by Captain Reichert, of the tug Metropolitan No. 3, only 17 days after the grounding of the Rincon Hills.

Recorded Statement of ALBERT REICHERT
Master of the M/T METROPOLITAN NO. 3
Dated NOVEMBER 26, 1951

STATE OF NEW YORK,
COUNTY OF NEW YORK, } SS.

ALBERT REICHERT, being duly sworn,

deposes and says: That at all times hereinafter mentioned he was master of the M/T METROPOLITAN NO. 3.

On November 26, 1951, at about 1:00 p.m., I was proceeding down the East River from stakeboat #2 off College Point as I had orders to take a scow out of the tow of the tug METROPOLITAN NO. 2 in the vicinity of the Battery and take the scow up the North River.

At about 1:00 p.m. I observed the tug METROPOLITAN NO. 2 with her tow of three loaded scows made up tandem fashion proceeding down the East River and in toward the Staten Island ferry slips. I also observed the tanker RINCON HILLS which at this time appeared to me to be to the south of the Battery, but up above the East River deep channel ranges. I should judge that the tug METROPOLITAN NO. 2 and her tow were proceeding about 300 or 400 feet off the pier ends and I also observed the tug LONG BRANCH coming down the East River with two carfloats in tow one on each side. The LONG BRANCH proceeded to overtake and pass the METROPOLITAN NO. 2 on the METROPOLITAN NO. 2's port side. The tanker RINCON HILLS was heading so as to proceed toward the East River deep channel ranges and apparently to get in a position to

LH:IB

turn and go up the East River. The METROPOLITAN NO. 2 and her tow proceeded down the St. George ferry racks on her way to stakeboat #1 and I was proceeding along about 500 feet to the stern of the METROPOLITAN NO. 2's tow but to her port or further out in the river than the METROPOLITAN NO. 2 was. When I arrive about abreast of the tanker RINCON HILLS she ran aground on Diamond Reef. At this time I was about 150 yards off the RINCO HILLS so that there was this much clear water between the port side of the RINCON HILLS and the port side of the METROPOLITAN NO. 3. At this time the tug LONG BRANCH and her floats were ahead of me but off to my port.

I notice that when the tug LONG BRANCH and her float came down and were passing around the Battery that the stern en of this tow was swinging somewhat toward the course of the RINCON HILLS, but I estimate that there was a clearance of abo 200 feet between the stern of the LONG BRANCH's tow and the RINCON HILL when they passed each other.

After the RINCON HILL ran aground on Diamond Reef I heard them broadcasting over the telephone that the ship had run aground and was about four feet out of water at the bow. I also heard them report that the RINCON HILLS went aground because the wheelsman put the wheel the wrong way and apparentl had put the wheel to the right instead of to the left. Later I again heard the Merrick's tugs telephone and at that time they reported that the tug METROPOLITAN NO. 2 and her tow were in t vicinity and that the tug LONG BRANCH and her tow were also in

the vicinity and that this latter tow crowded the RINCON HILLS somewhat.

From what I observed of the navigation of the METROPOLITAN NO. 2 she at no time and in no way interfered with the navigation of the RINCON HILLS and at no time did she come close enough to the RINCON HILLS to either crowd her or cause her to change her course in any way.

SWORN to before me this 13th day of December, 1951.

Albert Beaubert

Elizabeth Soffel

ELIZABETH [illegible]
Notary Public [illegible]
Queens [illegible]

County Clk. & [illegible]
County Clk. & [illegible]
County Clk. & [illegible]
Commission Expires March 30, 1953

APPENDIX F

Copy of Exhibit 70, diagram drawn by Captain Coleman L. Molloy, of the tug Long Branch, at Coast Guard Investigation.

APPENDIX G

Copy of Exhibit 74, which is a reproduction of Exhibit 70 with additional markings made at the trial by Captain Coleman L. Molloy, of the tug Long Branch.

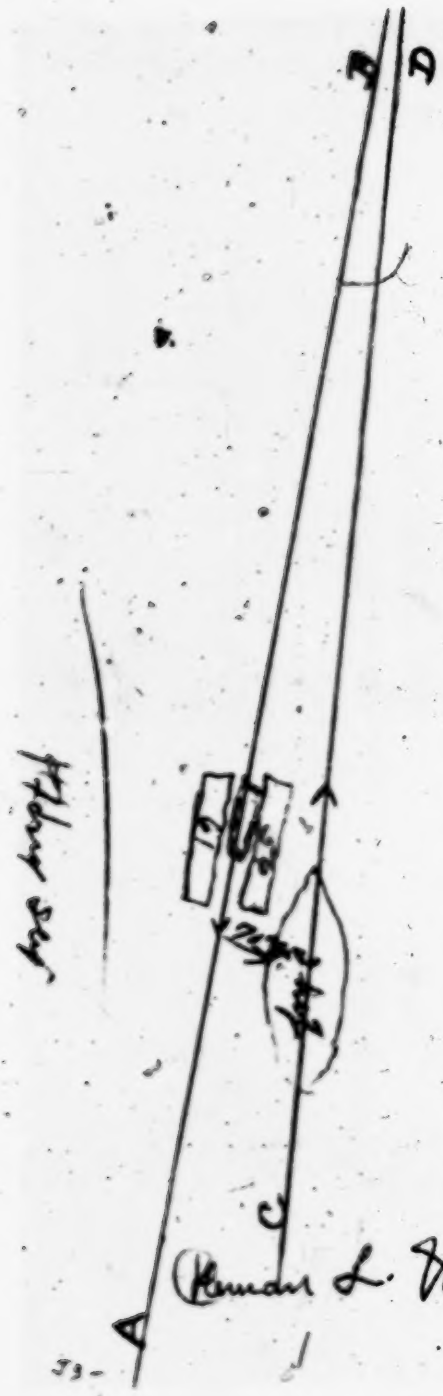


EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
MAY 1955
ADM

LE COPY

Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows, G-G 202, G-G 150 and G-G 101,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterers of said vessel,

Respondents.

REPLY BRIEF OF PETITIONER, METROPOLITAN SAND & GRAVEL CORPORATION TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO F. HANAN,
CHARLES J. CARROLL, JR.,
Counsel for Petitioner,
99 John Street,
New York 38, N. Y.

Rowne & Co., Inc., 163 Front Street, New York 38